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No. [redacted] 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1937

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its affiliated Companies, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY

Petitioners

against

NATIONAL LABOR RELATIONS BOARD

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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March 31, 1938

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners Consolidated Edison Company of New York, Inc., and its affiliated Companies pray that a writ of certiorari issue to review the decision of the Circuit Court of Appeals, Second Circuit, rendered March 14, 1938 (R. 1737-1747), and the Order entered by that Court on March 21, 1938 (R. 1748), denying the application of the petitioners (R. 1473-1536) that an Order made by the National Labor Relations Board on November 10, 1937 (R. 127-130), be reviewed and set aside or modified, and granting the

request of the Board (R. 1703-1711) for the enforcement of its Order asserting its jurisdiction over the petitioners as to their labor relations and requiring the petitioners to do and desist from doing various acts and things.

The Opinion of the Circuit Court of Appeals has not been reported and is at R. 1738.

A. Summary Statement of the Matters Involved

The Board having made an Order as to the petitioners (Appendix "A" hereto), the petitioners asked the Court below, pursuant to Section 10(f) of the National Labor Relations Act (hereinafter referred to as "the Act"), to review and to set aside or modify the Board's Order. By cross-petition (R. 1703-1711), the Board requested the enforcement of its Order.

As a "person aggrieved" by the Board's Order, the International Brotherhood of Electrical Workers affiliated with the American Federation of Labor (hereinafter referred to as the "Brotherhood") also filed a petition for review (R. 1554-1581), under Section 10(f) of the Act, as to such parts of the Order as affected the Brotherhood. The United Electrical and Radio Workers of America affiliated with the Committee for Industrial Organization (hereinafter referred to as "United") had filed the charge (R. 4-6) upon which the complaint of the Board was based (R. 7-16), and in the Court below was admitted as an intervenor, upon its application (R. 1737). The Order of the Court below granted enforcement of the Board's Order (R. 1748).

The petitioners carry on their business wholly within the City of New York and the adjacent County of West-

chester (R. 72-73). Gas, electricity and steam generated by them are delivered to customers only within the State of New York (R. 1361). They buy no gas or steam; such electricity as they buy is generated and purchased within the State of New York (R. 1360).

The Court below found, as did the Board, that each of the petitioners, with one exception, is a "public utility company" as defined in the Public Service Law of the State of New York and, as such, is subject to the plenary jurisdiction of the Public Service Commission of the State of New York (R. 1374, 1739). The one exception is Consolidated Telegraph and Electrical Subway Company, which maintains and leases space in subsurface ducts within the City of New York under the authority of contracts which it has with the City of New York (R. 1739). Excepting the Subway Company, none of the petitioners is engaged in any business other than that of a local public utility company (R. 1739).

Each of the petitioners is likewise subject to the New York State Labor Relations Act (Ch. 443, Laws of 1937) and to the jurisdiction of the State Board thereby created, "unless", as the Court below pointed out, "jurisdiction of the State Labor Relations Board must yield to that of the National Board" (R. 1739).

The Court below found that the petitioners "are local public utility corporations and their production and distribution of electricity, gas and steam are carried on solely within the City of New York and adjacent Westchester County" (R. 1739). They neither own, operate nor control, directly or indirectly, any item of plant or equipment, or carry on any operation or part of their business, outside the State of New York (R. 1339). They sell and deliver

their service to retail consumers, or to "wholesale" customers, such as apartment house owners or office building owners, who buy from the petitioners and sub-meter the service to their tenants, all within their local territory (R. 72-73, 1373).

The opinion below stated the petitioners' purchases of raw materials for the year 1936, consisting of 5,000,000 tons of coal and more than 114,000,000 gallons of oil. The Court found that "All of the oil and all but an insignificant portion of the coal moved to the petitioners' plants from States other than New York. The out-of-state purchases are made from independent dealers and are delivered by independent carriers" (R. 1740).

Of the petitioners' 2,324,800 electric consumers (all within the City of New York and adjacent Westchester County) approximately 1,896,800, or 81 per cent, are *residential* consumers (R. 1343, 1373). Approximately 427,100 are commercial consumers, which include the "wholesale" customers already mentioned and the many thousands of small factories, establishments, wholesale and retail shops, restaurants, hotels, churches, schools, charitable institutions and hospitals, within the local territory (R. 1373). The proportion of *residential* consumers among the petitioners' gas consumers is even higher (R. 1344).

Although the bulk of the petitioners' business, in terms of both quantity of service and number of customers, consists of residential and local consumers, the Court below pointed out that the petitioners also have certain customers who, in turn, are engaged in interstate commerce (R. 1740). Special mention was made of the fact that the petitioners supply electric energy to the following railroads for use for light and power in operating locally their prop-

erties and trains, including trains which go interstate: New York Central, New York, New Haven and Hartford, and the Hudson and Manhattan Railroads (R. 1340). Steam is supplied to the Pennsylvania Railroad which it uses to operate switches in its tunnel under the Hudson River.

In the year 1936, the petitioners' total sales of electric energy to railroads were 376,800,766 kilowatt hours. Their sales of electric energy to all of their consumers totalled 5,130,976,460 kilowatt hours. The revenues realized from these sales to railroads were $3,112,902.92. The revenues realized from their total sales of electric energy were $180,885,045.65. In terms of percentages, 7.34% of the petitioners' total sales of electric energy was to railroads; only 1.72% of their total revenues from sales of electric energy came from the railroads (R. 1347).

The New York State Labor Relations Act is all-inclusive of the provisions of the National Act, and was enacted for the purpose of extending to the labor relations of employers engaged in local, intra-state enterprises a supervision similar to that designed by the National Act as to employers in interstate commerce. In the instant case, the National Board and the Court below have held that although the petitioners are engaged only in local, intra-state business, the jurisdiction of the State Board over them must give way to that of the National Board, even though there is no evidence of a strike, threatened interruption of service, or any inadequacy of the State Act or the State Board.

The Court below properly observed (R. 1739) that "It is not contended that the petitioners are themselves engaged in commerce as so defined" (in the National Act). The Court based its decision chiefly on the fact that the petitioners supply service to some consumers who, in turn, engage in interstate commerce (R. 1741). The Court did

not consider it necessary to decide "whether their [petitioners'] importations of raw materials are alone enough to bring them under the Board's jurisdiction. It is the use which some of their customers make of the electric energy and steam purchased from the petitioners that furnishes the Board its main ground for claiming jurisdiction" (R. 1741).

As to the considerations urged against construing the National Act so as to supersede the State Act and to bring under Federal jurisdiction local, operating public utility companies engaged only in intra-state business, the Court said: "We are not unmindful of the persuasive force of these arguments" (R. 1742). It also recognized that "None of the Labor Board cases decided by the Supreme Court has presented a situation like that at bar" (R. 1742).

The complaint was filed on May 12, 1937 (R. 7-16). It was based on a charge filed by the United on May 5, 1937 (R. 4-6). It alleged unfair labor practices, in violation of Section 8, sub-divisions (1), (2) and (3), and Section 2, sub-divisions (6) and (7), of the National Act (R. 16). The complaint tendered no issue as to *representation* or an election, under Section 9(c) of the Act.

A month before, on April 20, 1937, the petitioners had announced to their employees (R. 1204) their agreement with Mr. Tracy, International President of the Brotherhood, to enter into collective bargaining contracts with the Brotherhood, *in behalf of its members among the employees* (R. 1223, 1395). At that time, the number of employees belonging to the Brotherhood of the American Federation of Labor was not known to the management (R. 1222); the petitioners had recently acquired two generating stations whose employees were known to be members of the

Brotherhood or of the Federation (R. 1216, 1222). At the time of the hearings before the Board (June 29, 1937), it was the undisputed testimony (R. 1212, 1418), and the Court below found (R. 1745), that the Brotherhood members included 30,000 out of 38.000 eligible employees of the petitioners. These contracts with a substantial majority of the employees were and are considered of vital importance to the petitioners, who are charged by the State and City of New York with a responsibility for rendering *continuous* service to all customers, including those engaged in interstate commerce. The contracts stipulate, among other things, against resort to strikes or lock-outs and provide a system for the arbitration of all disputes without cessation of work, thereby giving practical assurance against interruption of service (R. 1428, 1429).

The complaint, in its original form nor as freely amended from time to time up to the last day of the hearings (see R. 7, 13, 14, 15), did not even mention the contracts, much less attack their validity. At no time during the hearings was any statement made, by or in behalf of the Board, that the validity of the contracts was in issue. Nevertheless, Section 1(f) of the Board's Order requires the petitioners to "Cease and desist from: * * * Giving effect to their contracts with the International Brotherhood of Electrical Workers" (Appendix "A" hereto).

The Court below was under the misapprehension that "The contracts were introduced by the petitioners in support of a contention that the issue of coercion of employees was thereby rendered moot." The contracts were in fact produced by the petitioners at the request of counsel for the Board (R. 868-870). A photostat copy of a typical contract was offered in evidence by counsel for the Board.

and received, on June 17, 1937, as *Board* Exhibit No. 14 (R. 870-871). Subsequently, printed copies of all of the agreements became available, and were each "produced at the request of the Board" and were received (R. 1230).

The complaint had alleged that the Brotherhood was "dominated, supported and interfered with" by the petitioners (R. 15). The claim was in effect that this long-established international labor organization, the members of which included 80 per cent of the petitioners' employees, was in effect a "company union," outside the protection of the Act under Section 2(5) thereof (R. 280). This attack upon the integrity and independence of the Brotherhood was not sustained by the Board, which dismissed so much of the complaint as made any charge under Section 8(2) (R. 130), or by the Court.

The Court below said that "It is not so clear, however, that invalidating the contracts is an appropriate Order against the petitioners" (R. 1745). It recognized that the finding as to the independence of the Brotherhood made the case unlike that decided by this Court in *National Board* v. *Pennsylvania Greyhound Lines,* 302 U. S. ——, where the dis-establishment of a company-dominated union was involved. The Court said: "Since the Brotherhood is not dominated, supported or interfered with by the petitioners, it is not immediately obvious that the employees' right to self-organization will be injured by allowing the contracts to be carried out" (R. 1745). The Court further pointed out that, under Section 1, subdivisions (a) (b) (c) (d) (e) (g) and (h), of the Order, the petitioners' employees would have "complete freedom to join United in preference to the Brotherhood, or to join neither." With apparent reluctance, the Court concluded that the Board's action was

not "so unwarranted as to necessitate deleting clause (4) from the Order" (R. 1746).

The Board denied the petitioners an opportunity to present and complete their case, by refusing, even after a vital amendment of the complaint had been allowed without notice (R. 1312), to permit the calling of witnesses present in the hearing-room on the one day devoted to petitioners' proofs (R. 1315). The Court below considered this refusal to have been "unreasonable and arbitrary" (R. 1747), but pointed out that the petitioners had not asked *the Court* for the taking of additional evidence, and so sustained the findings made by the Board upon evidence thus incomplete.

A Trial Examiner named by the Board held the hearings. No member of the Board saw any of the witnesses or heard any of the testimony. The case was "transferred" by the Board from the Trial Examiner unto itself, and "continued before the Board" (R. 64). The Trial Examiner made no intermediate report or findings, as contemplated by its Rule 32; the findings were made only by Board members, who had heard none of the evidence; the Board gave the petitioners no hearing before the Board, as required by Sections 29 and 37 of the Board's Rules, although such a hearing had been requested (R. 19); and the petitioners were given no opportunity for oral argument or for the submission of a brief *to the Board* (the petitioners having only submitted a brief to the Trial Examiner, in aid of his preparation of findings, which he never made).

As to the Board's procedure above summarized, the Court below said that "This procedure is not one likely to inspire confidence in the impartiality of the proceedings", but that "though we do not commend such procedure, we

cannot say that it has deprived the petitioners of due process of law" (R. 1743).

A finding by the Board that the petitioners had discharged six employees because of union activities, contrary to Section 8(3) of the Act, was affirmed by the Court with a statement that "We cannot say that the record is wholly barren of evidence to support the charge * * *." Reinstatement with back pay was ordered (R. 1746).

B. Questions Presented

(1) Does the National Labor Relations Act authorize the Board to exercise jurisdiction over the petitioners, which are local operating public utilities doing business wholly within the City of New York and an adjacent county, are concededly not engaged in "commerce" as defined in the Act, and are subject to plenary regulation by the State of New York under its Public Service Law and its State Labor Relations Act?

(2) If the National Act was intended to confer on the Board jurisdiction over the petitioners as to the matters here complained of by the Board, is the Act constitutional as so construed and applied?

(3) Where the Trial Examiner designated by the Board made no report or findings and none of the members of the Board saw or heard any of the witnesses, and the Board gave to the petitioners no opportunity to be heard before the Board (although such an opportunity was requested) nor any opportunity to object to or be heard as to any proposed findings, do the findings of fact made by the Board under such circumstances conform to the requirements of the Board's Rules and to due process of law?

(4) Were the petitioners denied due process of law by the Trial Examiner and the Board, by their refusal to hear evidence sought to be introduced at the hearings before the Trial Examiner in behalf of the petitioners?

(5) Where, as the Court below found, the refusal by the Trial Examiner and by the Board to hear evidence sought to be introduced at the hearings before the Trial Examiner in behalf of the petitioners was "unreasonable and arbitrary," were the findings of fact made by the Board on the basis of a record thus arbitrarily restricted nevertheless to be taken as conclusive if the petitioners did not ask the Court for the taking of the evidence at the time of the proceedings to enforce or review the Order?

(6) In the absence of evidence that the alleged unfair labor practices with which petitioners were charged have led or are likely to lead to an actual obstruction or interference with interstate commerce, may the Board assume jurisdiction over local activities by assuming that if the practices were not stopped they might cause a strike, the strike might suspend the petitioners' service, and interstate commerce might be disrupted?

(7) Were the petitioners denied due process of law by Section 1(f) of the Board's Order requiring the petitioners to cease and desist from giving effect to their collective bargaining contracts with the Brotherhood, when no question as to the validity of these contracts was raised in the complaint or at the hearings, and the Board dismissed so much of the complaint as involved any charges that the petitioners had dominated or interfered with the formation or administration of, or had contributed financial or other support to, the Brotherhood contrary to Section 8(2) of the Act?

C. Reasons Relied on for the Issuance of the Writ

1. The decision of the Circuit Court of Appeals involves important questions as to the construction and constitutional application of the National Labor Relations Act which have not been, but should be, decided by this Court. The opinion of the Court below reflects, we submit, an absence of conviction that the petitioners are constitutionally subject to the Act. "None of the Labor Board cases decided by the Supreme Court has presented a situation like that at bar." In no case presented, has it been determined by this Court that the National Act confers jurisdiction on the Board as to an employer who concededly is not itself engaged in "commerce" as defined in the Act. Nor has it been decided by this Court that the Act gives the Board jurisdiction over local public utilities which operate wholly within a single State and are subject to plenary regulation by the State as to practically every phase of their business, including supervision by a State Labor Relations Board. And where, as in this case, there is and could be no finding or showing that the State Labor Relations Board would not deal effectively and adequately with the very matters which give rise to claim of Federal jurisdiction, this Court has finally to determine whether or not the labor relations of such an employer are brought under the jurisdiction of the National Board because of its assumption that such a labor dispute or strike would or might affect interstate commerce carried on by a few of the employer's customers.

2. This Court has said that: "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is

left by the statute to be determined as individual cases arise." *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 32. We submit that this petition brings here an individual case of such scope and significance as a precedent that this Court should review and determine it. If the National Act is to be held applicable to these petitioners upon the main ground relied upon by the Circuit Court of Appeals, or upon that ground together with a consideration of the petitioners' consumption of raw materials originating outside the State, then rare is the public utility company anywhere in the United States which will not be brought under the jurisdiction of the National Board, and State jurisdiction will cease to exist. The Circuit Court of Appeals expressly recognized "the persuasive force" of our contention that to extend this National Act to petitioners subject to regulation under an all-inclusive State Labor Relations Act and State Public Service Law enacted in furtherance of the health, safety and welfare services of the State, is to push the concept of "affecting commerce" to unintended extremes and essentially to obliterate the dual system of government provided by the Constitution.

3. If the decision and reasoning below are to stand, a re-statement of constitutional law should contain a principle to this effect: The National power over local industry can be pushed and extended, under the commerce clause, to apply to all local, wholly intra-state enterprisers who sell goods or render any substantial service to anyone who is engaged in interstate or foreign commerce. All that would be necessary to confer such jurisdiction on the National Board would be that the Board itself find that if there were to be a labor dispute among the employees of the local, intra-state employer, and if such employees were to go on strike, and if such strike were to suspend the employer's op-

erations, such stoppage might affect the employer's service or supply of goods to others and therefore might tend to affect interstate commerce carried on by the others. Such a method of extending Federal power over local concerns, through a series of assumptions and hypotheses found by a Federal board, seems to us to be contrary to the principles, among others, expressed by the Chief Justice in the *Carter Coal* case (298 U. S. 238, 318), that "If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision."

4. The decision of the Circuit Court of Appeals presents several important questions concerning the application of the constitutional requirements of due process of law to proceedings of administrative agencies—questions which have not been, but should be, finally determined by this Court. The Court below seems to us to have indicated the propriety of such a review. As to the Board's procedure in the instant case, the Court said: "This procedure is not one likely to inspire confidence in the impartiality of the proceedings. It results in the findings of fact being made by persons who did not see the witnesses—a matter which may have far-reaching consequences in view of the very limited power conferred upon the Courts to review the Board's findings of fact. But, though we do not commend such procedure, we cannot say that it has deprived the petitioners of due process of law." Again: The Court said that the Board's refusal to hear petitioners' witnesses present in the hearing-room was "unreasonable and arbitrary," but the Court sustained findings based on a

record thus incomplete. The determination of these questions of fair hearing will serve as a precedent and guide for National and State administrative agencies, as well as adjudicate the rights of the petitioners.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in case numbered on its Docket No. 177, and entitled as above shown, and that said decree of the Circuit Court of Appeals may be reversed or modified by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

New York, March 31, 1938.

WILLIAM L. RANSOM,
PINCUS M. BERKSON,
Counsel for the Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Court below has not been officially reported, and is at R. 1737. The decision and Order of the Board are at R. 65-130. Its Order is Appendix "A" to this petition.

Jurisdiction

This proceeding involves questions arising under the Constitution and laws of the United States. Jurisdiction is believed to be conferred by Section 10(e) of the National Labor Relations Act (*Act of Congress, July 5, 1935; 49 Stat. 10*) and by Section 240 (a) of the Judicial Code as amended (*43 Stat. 938*).

Statute involved

The pertinent parts of the National Labor Relations Act will be found in Sections 1, 2 (5), (6) and (7), 7, 8 (1), (2) and (3), and 10 (a), (b), (c), (e) and (f) thereof. Under the decision and Order of the Board and the decision and Order of the Court below, substantial questions of law are presented as to the construction, validity and applicability of the statute, the intended jurisdiction of the Board, the regularity and conformance of its proceedings and findings to due process of law, and the sufficiency of the support for its findings and Order.

Specification of errors to be urged

(1) The Circuit Court of Appeals erroneously decided that the National Act authorizes the Board to exercise its

jurisdiction over the petitioners and over the matters complained of by the Board.

(2) The Court below erroneously decided that the provisions of the National Labor Relations Act may be validly enforced against the petitioners under the Constitution.

(3) The Court below erroneously decided that the procedure whereby the case was transferred to the Board without any findings of fact or conclusions of law being made by the Trial Examiner who had heard the witnesses, and whereby the decision by the Board was made without notice or opportunity for the petitioners to be heard by the Board or otherwise with respect to any findings of fact or conclusions of law of the Board, was in compliance with the Rules of the Board and did not deny the petitioners due process of law.

(4) The Court below erroneously decided that the rulings by the Trial Examiner and by the Board, refusing to hear evidence sought to be introduced in behalf of the petitioners, were valid and did not deny the petitioners due process of law.

(5) The Court below erroneously decided that the Order of the Board requiring the petitioners to cease and desist from giving any effect to their collective bargaining contracts with the Brotherhood is valid and does not deny the petitioners due process of law.

(6) The Court below erroneously decided that the findings of fact of the Board were validly made and that they were sufficiently sustained by proper evidence, whereas the purported findings of fact upon which the Board as-

serted and exercised jurisdiction were a series of assumptions and hypotheses unsupported by evidence.

(7) The Court below erroneously decided that the conclusions of law of the Board are valid.

(8) The Court below erred in holding that the National Act, as construed, applied and administered by the Board in this case, complies with the Fifth and the Tenth Amendments to the Constitution of the United States.

ARGUMENT

I

The decision of the Court below involves important questions as to the construction and constitutionality of the National Labor Relations Act as applied to the petitioners

This Court has never decided whether or not the National Act vests the Board with jurisdiction over local, wholly intra-state public utilities subject to plenary State regulation. And especially significant it is that there has been here no finding that the State Labor Relations Act and Board have been or are in any way inadequate to prevent the very labor practices here complained of, as to such local utilities, from obstructing interstate commerce. This Court has not held that such purely local matters as were the subject of complaint here "affect commerce in such a close and intimate fashion as to be subject to Federal control" (*Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 30, 32). This Court has not held any intra-state employer to be subject to the jurisdiction of the National Board

solely because a strike among its employees might tend to affect *interstate commerce carried on by others.*

In the *Jones & Laughlin* case, this Court adverted (pages 37-39) to the extent to which intra-state matters, dealing *primarily* with a local activity, may come under National authority predicated upon the commerce clause. Under the authorities there cited, we understand that even though such local activity closely and intimately affects interstate commerce, it may become subject to such National authority secondarily and conditionally, to the extent of correcting or taking the place of a defaulted State control found to be prejudicing interstate commerce. The failure of the State to control adequately the primarily local concern should at least be precedent to National intervention and authority over such local matters. *Florida* v. *United States*, 282 U. S. 194. The underlying principle of the *Florida* case is given effect, as we see it, in *Pennsylvania* v. *Williams, et al.*, 294 U. S. 176, and in *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315.

Why should the petitioners' business, which is primarily and functionally a local activity, be immediately and unconditionally subject to the National Labor Relations Act, notwithstanding the all-inclusive New York State Labor Relations Act and the absence of any finding of its inadequacy?

On the record in this case, it is manifest that if the operations or labor relations of the petitioners come within the broad definitions of the Act at all, they are included only in "affecting commerce" in that they are "tending to lead" to a labor dispute burdening or obstructing commerce. "Affecting commerce," together with "commerce" as defined in the Act, has been translated by this Court as follows:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board * * * purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Labor Board* v. *Jones & Laughlin, supra* (page 31).

Under this interpretation of the definition, are not the petitioners, engaged as they are primarily and exclusively in local activity, or at the most only within some area so remote to "commerce" as that possibly contemplated by the clause "tending to lead," outside the constitutional intent of the Act?

The Court below here took the position that the problem should be "approached as a question of fact, namely, 'what will be the result upon commerce of a *labor dispute* between the petitioners and their employees.'" In view of the supposed functional dependence of the railroads upon the petitioners' service, it was concluded that: "Should such a dispute *result in interrupting the petitioners' service,* the effects upon commerce would be catastrophic." The idling of the railroads, stoppage of interstate communication, and the going out of the lights which aid interstate ferries and foreign steamships, would constitute "effects we cannot regard as indirect and remote."

We have been admonished that interstate commerce (and, we assume, intra-state commerce as well) is a "practical conception"; that the question of "direct and indirect effects" upon commerce may not be disposed of in an "intellectual vacuum"; that Federal power may not be extended "so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, *in view of our complex society,* would effectually obliterate

the distinction between what is national and what is local * * *"; that "*The question is necessarily one of degree.*" *Labor Board v. Jones & Laughlin, supra* (page 37).

Even the "effects" upon commerce contemplated by the Court below are indeed, we submit, "indirect and remote," from the subject-matter of the National Labor Relations Act, even when the question is approached "as a question of fact." The "ifs" in the causal sequence are evident. These "ifs" are as follows: *If* a labor dispute should arise between the petitioners and their employees, and *if* that dispute should lead to a strike, and *if* that strike should culminate in a sufficient shut-down of the petitioners' service, all of which are as a matter of actualities unsupported assumptions, the effects upon commerce would be realized. But there is and could be no finding that the State Board would not act as effectively and completely to avert such dispute, strike, and the supposed effects. In all of the Board's series of assumptions, no credit is accorded the office and functions of the Labor Relations Board of the State of New York in this connection, or of any other public authorities of the City or State, who would be immediately and primarily concerned by the very incipiency of such a labor controversy. And certainly there is no basis, we submit, for an assumption that the National Board would be any more effective than the State Board in *absolutely preventing* the highly improbable catastrophe posed by the Court below.

The facts here show that the petitioners' business is primarily and predominantly "local," primarily and predominantly a matter of "internal concern" of the State of New York; that their business is necessarily and properly considered to be exclusively within the jurisdiction of the State of New York because the directness and imminency

of its relation to the health, safety, convenience and welfare of the millions of people who reside and do business day by day in the City of New York, entirely subordinate any of its aspects which might be separately identified as of National public interest for any useful purpose of Federal regulation; that in terms of human, social or even economic welfare, *desiderata* concerning the "free flow of commerce" would pale in comparison with the problems of health, sanitation, safety and convenience of its own inhabitants, if New York City were to be without light and power for its millions of homes, and thousands of office buildings, hospitals, schools, libraries, hotels, restaurants, theatres, shops and public streets; that the State of New York should have the primary, undivided, police power to handle such untoward situation if ever it became a reality; that it should have like power to regulate, control and supervise the petitioners' business in anticipation of and with a view of preventing any such catastrophe; and that there has been no showing that the regulatory measures taken by the State and City of New York in furtherance of the protection of its own residents in New York City, have or will work otherwise than to facilitate and protect the interests of interstate and foreign commerce. The proposed extension of Federal jurisdiction into these activities which are primarily local and are subject to present and adequate regulation by the State Labor Board is not, we believe, either "*necessary or appropriate*" under the National Act, and is contrary to the constitutional system of dual government.

II

The decision of the Court below condoned various proceedings, findings and rulings of the Board which contravene due process of law.

Collective bargaining agreements between the petitioners and the Brotherhood, with a membership as the Court found of 30,000 of the petitioners' 38,000 eligible employees, were nullified by the Order of the Board. That these agreements provide for a system of arbitration of disputes relating to employment and stipulate against strikes and lock-outs seems to have borne no weight with the Board, notwithstanding the general purpose of the Act to eliminate sources of industrial strife.

This invalidation was ordered without notice or opportunity of hearing to the petitioners or the Brotherhood, and, indeed, without mention of the contracts or their validity in the charge or in the complaint, or without challenge of their validity at any time during the hearings. Furthermore, the Order was made although the Board found that the petitioners had in no way offended Section 8(2) of the Act—that they had not dominated, interfered with, or contributed any support to the Brotherhood.

As the Court below noted, this last finding makes the case unlike *National Board* v. *Pennsylvania Greyhound Lines*, 302 U. S. —, in which the union had been reared and dominated by the employer as a "company union." The Court also found that, by reason of the other provisions of the Board's Order, the invalidation of these contracts was unnecessary to give the petitioners' employees "complete freedom to join United in preference to the Brotherhood, or to join neither."

Upon these considerations, we submit that the Board acted with apparently punitive purpose and partiality against the petitioners and the Brotherhood, and that its Order unnecessarily confiscates their contracts, which were conceived and accomplished with a view to the public interest.

The Board directed the Trial Examiner to permit Mr. Carlisle and Mr. Dean to testify at the final hearing on July 6th, but that they were to be "the only two witnesses who will be permitted to testify on your behalf." The case was closed on July 6th. Witnesses present in the hearing room were refused an opportunity to be heard. Nearly three months later, on September 29, 1937, without notice to the petitioners, and without any intermediate findings or report by the Trial Examiner as contemplated by the Board's Rule 32, the Board ordered that "this proceeding be transferred to and continued before the Board" (R. 64). There were no further proceedings before the Board, and at no time were the petitioners or the Brotherhood given any notice or opportunity to be heard or to present any argument or any brief before the Board. The decision, findings, and Order of the Board were made on November 10, 1937.

"The inexorable safeguard which the due process clause assures is * * * that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a Court to determine whether the applicable rules of law and procedure were observed."

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 73; see, also,

Morgan v. *United States*, 298 U. S. 468, 480;
Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91;
Ungar v. *Seaman*, 4 Fed. (2d) 80, 82-83 (C. C. A. 8).

If, as the Court below found, the Board's refusal to hear the petitioners' witnesses was "unreasonable and arbitrary," and its *ex-parte* transfer and decision of the case were a procedure not "likely to inspire confidence in the impartiality of the proceedings," we think it is clear that the "applicable rules of law and procedure," essential to due process, were *not* observed.

Notwithstanding the Court's conclusion that the Board's refusal to hear petitioners' witnesses was "unreasonable and arbitrary," it appears to have condoned the action on the ground that the petitioners did not apply *to the Court* under Section 10(e) of the Act for an order to hear the witnesses. We respectfully submit that the Court erred in this judgment because, in such a case, the remedy of Section 10(e) would be merely formal and illusory. This is true because of "the very limited power conferred upon the Courts to review the Board's findings of fact," mentioned by the Court itself.

We will further refer to the apparent extreme to which the Court went in sustaining the Board's findings of fact that the petitioners discharged six named employees because of their union activities, contrary to Section 8(3) of the Act. The Court seems to have sustained those findings upon the following basis: "We cannot say that the record is *wholly barren of evidence to support* the charge * * *."

We respectfully submit that the Court again erred by this determination in this case because the provision of Section 10(e) of the Act, that the findings of the Board as to the facts, if supported *"by evidence,"* shall be conclusive, is applicable only if there is a substantial preponderance (when there are conflicting evidentiary data) to support the findings. *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 Fed. (2d) 985, 989 (C. C. A. 4).

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the new and far-reaching questions of Federal law present in this case may be decided by this Court, and that to such end the petition for a writ of certiorari should be granted.

WILLIAM L. RANSOM,
PINCUS M. BERKSON,
Of Counsel.

APPENDIX A

ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Consolidated Edison Company of New York, Inc., and its affiliated companies: Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discouraging membership in United Electrical and Radio Workers of America or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with

discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and

to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

a. Offer to Martin A. Wersing, Julius A. Greulich, Michael A. Wagner, William J. Kennedy, John F. Emler and Stephen L. Solosy immediate and full reinstatement to their former positions without prejudice to their seniority and other rights or privileges;

b. Make whole Martin A. Wersing, Julius A. Greulich, Michael A. Wagner, William J. Kennedy, John F. Emler and Stephen L. Solosy for any loss of pay they have suffered by reason of their discharges, by payment to each of them of a sum equal to that which he would normally have earned as wages during the period from the date of his discharge to the date of such offer of reinstatement, less the amount earned by him during such period;

c. Post immediately notice to their employees in conspicuous places through their offices, buildings, plants and other places of employment stating: (1) that the respondents will cease and desist in the manner aforesaid; (2) that the respondents' employees are free to join or assist any labor organization for the purposes of collective bargaining with the respondents; (3) that the respondents will bargain collectively with any labor organization entitled thereto; (4) that the respondents will not discharge, or in any manner discriminate against members of United Electrical and Radio Workers of

America or any other labor organization of their employees or any person assisting such organizations by reason of such membership or assistance; (5) that the respondents will not discharge, or in any manner discriminate against any employee for refusal or failure to join or assist International Brotherhood of Electrical Workers or any other labor organization of their employees; (6) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

d. Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Order what steps the respondents have taken to comply herewith.